

AMENDED IN ASSEMBLY AUGUST 7, 2006

AMENDED IN ASSEMBLY JULY 7, 2005

AMENDED IN SENATE MAY 27, 2005

AMENDED IN SENATE APRIL 4, 2005

## SENATE BILL

**No. 171**

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### **Introduced by Senator Alquist**

(Coauthors: Assembly Members Cohn and Dymally)

February 9, 2005

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An act to add Section 859.5 to the Penal Code, relating to criminal procedure.

#### LEGISLATIVE COUNSEL'S DIGEST

SB 171, as amended, Alquist. Interrogation: recording.

Existing law provides that under specified conditions the statements of witnesses, victims, or perpetrators of specified crimes may be recorded and preserved by means of videotape.

This bill would enact the Truth in Prosecution Act of 2005, which would provide that (1) except as specified, any custodial interrogation conducted at a place of detention of an individual suspected of committing or accused of a homicide or a ~~violent~~ *serious* felony, as defined, shall be electronically recorded, as specified; (2) the state shall not destroy or alter the electronic recording of a custodial interrogation, except as specified; and (3) if a court finds that a defendant was subjected to an unlawful custodial interrogation, the court shall, at the request of the defendant, provide the jury with a cautionary instruction, *developed by the Judicial Council*, as specified. By imposing these new requirements on local law enforcement when they are interrogating a defendant suspected of committing or accused

of a homicide or ~~violent~~ *serious* felony, this bill would impose a state-mandated local program upon local government.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

Vote: majority. Appropriation: no. Fiscal committee: yes.  
State-mandated local program: yes.

*The people of the State of California do enact as follows:*

1     SECTION 1. It is the intent of the Legislature in enacting this  
2     act to require the creation of an electronic record of an entire  
3     custodial interrogation in order to eliminate disputes in court as  
4     to what actually occurred during the interrogation, thereby  
5     improving prosecution of the guilty while affording protection to  
6     the innocent.

7     SEC. 2. This act shall be known and may be cited as the  
8     Truth in Prosecution Act of 2005.

9     SEC. 3. Section 859.5 is added to the Penal Code, to read:

10    859.5. (a) (1) Any custodial interrogation of an individual  
11    suspected of committing or accused of a homicide, as defined in  
12    Chapter 1 (commencing with Section 187) of Title 8 of Part 1, or  
13    a ~~violent~~ *serious* felony, as defined in subdivision (c) of Section  
14    ~~667.5~~ 1192.7, shall be electronically recorded.

15    (2) The requirement for the electronic recordation of a  
16    custodial interrogation pursuant to this section shall not apply if  
17    the person to be interrogated provides an electronically recorded  
18    statement expressing that he or she will speak to the law  
19    enforcement officer or officers only if the interrogation is not  
20    electronically recorded *in its entirety*.

21    (3) The state shall not destroy or alter any electronic recording  
22    made of a custodial interrogation of a defendant until the time  
23    that a defendant's conviction for any offense relating to the  
24    interrogation is final and all direct and habeas corpus appeals are  
25    exhausted or the prosecution of the defendant for that offense is

1 barred by law. *The state may make one or more true, accurate,*  
2 *and complete copies of the electronic recording in a different*  
3 *format.*

4 (b) Any law enforcement officer who conducts a custodial  
5 interrogation of an individual described in subdivision (a) shall  
6 be required to make an electronic recording of the interrogation  
7 pursuant to subdivision (a), unless the law enforcement officer  
8 can demonstrate, by a preponderance of the evidence, that the  
9 electronic recording of the custodial interrogation was not  
10 feasible for a specified reason, including, but not limited to,  
11 either of the following:

12 (1) Access to equipment required to electronically record an  
13 interrogation could not be obtained during the period of time that  
14 the defendant could be lawfully detained.

15 (2) The failure to create an electronic recording of the entire  
16 custodial interrogation was the result of a malfunction of the  
17 recording device and obtaining a replacement device was not  
18 feasible.

19 (c) If a court finds that a defendant was subjected to a  
20 custodial interrogation in violation of subdivision (a), the court  
21 shall, at the request of the defendant, provide the jury with a  
22 cautionary instruction ~~substantially similar to the following:~~

23 ~~“The law requires a law enforcement officer, when questioning~~  
24 ~~a person who may be charged with a homicide or violent felony,~~  
25 ~~to record all oral statements made to and made by that person.~~  
26 ~~The failure of a law enforcement officer to follow this law results~~  
27 ~~in less than a full and accurate record of the actual statement~~  
28 ~~made by the defendant, and denies the defendant the ability to~~  
29 ~~present recorded evidence that may be favorable to his or her~~  
30 ~~case.~~

31 ~~You have heard evidence that the defendant made a statement~~  
32 ~~to a law enforcement officer. You are the exclusive judge as to~~  
33 ~~whether the defendant made the statement, and as to what was~~  
34 ~~actually said. If you find that the defendant did not make a~~  
35 ~~statement, you must disregard the evidence of the statement and~~  
36 ~~not consider it for any purpose. If you find that the defendant did~~  
37 ~~make a statement, you must view the statement as reported with~~  
38 ~~caution, because unrecorded oral statements made by a defendant~~  
39 ~~out of court to a law enforcement officer should be viewed with~~  
40 ~~caution.~~

1   ~~You must decide whether or not the defendant in fact made that~~  
2 ~~statement, in whole or in part. The fact that a law enforcement~~  
3 ~~officer did not comply with the law requiring the electronic~~  
4 ~~recording of the reported statement shall be considered by you as~~  
5 ~~a circumstance tending to show that the statement was not made.~~  
6 ~~This failure by the law enforcement officer shall also be~~  
7 ~~considered by you as a circumstance bearing on the weight and~~  
8 ~~credibility to be given to the officer's account of the statement."~~  
9 *to be developed by the Judicial Council. The Judicial Council*  
10 *shall review proposed jury instructions developed in other states*  
11 *where the admission of evidence of any statement or confession*  
12 *is the product of an unrecorded custodial interrogation. In*  
13 *addition, the judge at trial may, in his or her discretion, give any*  
14 *additional instructions he or she deems appropriate pertaining to*  
15 *the custodial interrogation statement, or modify the Judicial*  
16 *Council instructions as may be necessary depending on the facts*  
17 *of the case.*

18   (d) For the purposes of this section, the following terms have  
19 the following meanings:

20   (1) "Custodial interrogation" means express questioning, or its  
21 functional equivalent, that is conducted at a place of detention  
22 that a law enforcement officer should know is reasonably likely  
23 to elicit an incriminating response from the defendant, under  
24 circumstances in which the defendant does not feel free to leave  
25 or terminate the questioning.

26   ~~(2) "Electronic recording" means a motion picture, videotape,~~  
27 ~~or digital recording that includes both audio and visual~~  
28 ~~representations of any interrogator or defendant involved in a~~  
29 ~~custodial interrogation. For a violent offense, other than a~~  
30 ~~homicide, "electronic recording" may include an audiotape.~~

31   (2) *"Electronic monitoring" means an analog or digital*  
32 *recording that includes the audio representations of any*  
33 *interrogator and individual involved in a custodial interrogation,*  
34 *provided however, that a motion picture, videotape, analog, or*  
35 *digital recording that includes both audio and visual*  
36 *representations of any interrogator and individual involved in a*  
37 *custodial interrogation is also permitted. The camera shall be*  
38 *positioned to capture images of the suspect and the*  
39 *interrogators. Law enforcement officers are recommended to*

1 *videotape the custodial interrogation of individuals suspected or*  
2 *accused of committing a homicide.*

3 (3) “Law enforcement officer” means any officer of the police,  
4 sheriff, highway patrol, or district attorney, and any peace officer  
5 included in Chapter 4.5 (commencing with Section 830).

6 (4) “Place of detention” means a police station, *sheriff’s*  
7 *station*, correctional facility, holding facility for prisoners, or any  
8 other ~~governmental~~ *law enforcement* facility in which a person  
9 may be held in detention in connection with any criminal charge  
10 that has been, or may be, filed against the person. “*Place of*  
11 *detention*” *does not include a law enforcement vehicle.*

12 SEC. 4. If the Commission on State Mandates determines that  
13 this act contains costs mandated by the state, reimbursement to  
14 local agencies and school districts for those costs shall be made  
15 pursuant to Part 7 (commencing with Section 17500) of Division  
16 4 of Title 2 of the Government Code.